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Comments
Of the
Center for Marine Conservation
And
Save our Shores

Re:

California Resources Agency
Draft Policy on Coastal Erosion Planning and Response

May 31, 2001

These comments are submitted by the Center for Marine Conservation (CMC) and Save our Shores. CMC is a nonprofit science-based advocacy organization dedicated to the preservation of the marine environment. CMC has more than 120,000 members nationally, and 21,000 in California. CMC is headquartered in Washington DC, with regional and field office in San Francisco, Santa Cruz and Santa Barbara. Save our Shores is a nonprofit conservation organization located in Santa Cruz, California dedicated to protecting and promoting the ecological integrity of the Monterey Bay National Marine Sanctuary through policy research, education and citizen action.

Introduction

More than almost any other feature, California is defined by its coastline. About 80% of its 33 million people live within 30 miles of the ocean. Its beaches generate about $14 billion annually from recreation and tourism revenue, and provide more than 800,000 jobs. Yet slowly but surely, California is killing the goose that laid the golden egg. About 85% of the California coast is actively eroding, and more and more seawalls are being constructed to stop shoreline erosion.[1] Unfortunately, the cure is slowly killing the patient. Each seawall only starves the shore of more sand, exacerbating the rate of erosion.

[1] Erosion will destroy 5,000 homes along the California coastline in the next 60 years, costing Californians about $110 million per year. Nationally, about 25% of homes and other structures within 500 feet of the shore will fall victim to erosion within the next 60 years. The Federal Emergency Management Agency and the H. John Heinz III Center, *Evaluation of Erosion Hazards*, April 2000.

As a result, California's golden shores are beginning to resemble fortified embankments. Already, one-quarter of the shoreline along the 535 mile stretch from the Golden Gate Bridge to the Mexico border is amored behind seawalls and other erosion control devices.[2] Sixty-five percent of the Ventura County coastline is armored, and seawalls cover 45% of the Malibu shoreline.[3] California may soon resemble Florida and New Jersey, which have walled off nearly 50% of their shoreline.

Seawalls, revetments and other rigid erosion control structures deprive beaches of natural sand replenishment, destroy beach and dune ecosystems, increase erosion, and hinder public access to and along the shore.[4] Once shoreline armoring begins it seldom stops. Each new seawall blocks the flow of sand to the beaches, increases the rate of erosion, and begins a deadly spiral that creates the need for still more seawall construction to protect eroding property. Eventually, beaches virtually disappear behind a wall of rubble and poured concrete. In this way, seawalls exacerbate beach erosion, threaten public safety and destroy beach communities, costing taxpayers millions of dollars annually in disaster relief and subsidized federal flood insurance.[5]

Some states have laws and policies that discourage development in high-risk zones, and prohibit the construction of seawalls and hard structures that exacerbate erosion. But California, despite its economic and cultural dependence upon the coastline, has one of the nation's weakest policies on coastal armoring. California, therefore, bears even a greater risk than other states that its beaches will erode at an ever increasing rate.

How Other States Deal With Erosion And Sea Wall Construction

California must recognize the hard lessons learned primarily by East Coast states that have been dealing with coastal erosion for centuries.

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[2] *Imperfect Armor on the Coast*, L.A. Times, May 9, 2000. In 1990, approximately 12% of California's coastline (130 miles) had some kind of armoring. Staff Report to the California State Lands Commission, *Shoreline Protective Structures*, April 2001

[3] California Coastal Commission, *Regional Cumulative Impact Assessment* Project, June 1999.

[4] *See generally* Cornelia Dean, *Against the Tide* (1999), and the 10 truths about shoreline armoring in Orrin H. Pilkey and Katharine L. Dixon, *The Corps and the Shore* (1996) at 51-53: (1) Armoring destroys the beach, it's ugly, and it reduces beach walkability; (2) There is no need for hard stabilization unless someone builds too close to the shoreline; (3) A relatively small number of people create the need for shoreline armoring; (4) Once you start, you cannot stop; (5) It costs more to save the property than it is worth; (6) Shoreline armoring begets more shoreline armoring (7) Shoreline armoring grows bigger; (8) Shoreline armoring is a politically difficult issue because of its long-term environmental impact; (9) Shoreline armoring is a politically difficult issue because no compromise is possible; (10) You can have buildings or you can have beaches; you cannot have both.

[5] Over the past 25 years the federal government as spent $140 billion in federal tax revenue on natural disasters. National Wildlife Federation, *Higher Ground*, July 1998.

Maine prohibits all new seawall construction or expansion on any sand dune system.[6] It has learned that attempts to prevent erosion and flooding through the construction or enlargement of seawalls and other shoreline protective devices cut off the natural supply of sand to the beach and reflect waves onto the beach causing sand to be scoured away.[7] Maine has even adopted regulations that require the removal of existing seawalls and restoration of the site to natural conditions within one year if the shoreline recedes so that coastal wetlands extend to any part of the structure for a period of six months or more.[8] Existing seawalls may be repaired and maintained if the failure to repair will cause an unreasonable flood hazard to a building, public road, public water supply or sewer system, and the repair and maintenance does not increase the dimension of the seawall.[9] But buildings destroyed by more than 50% may not be rebuilt without a special permit.[10]

North Carolina prohibits all erosion control structures, such as seawalls and bulkheads, in Ocean Hazards Area of Environmental Concern (AEC).[11] AECs include beaches, frontal dunes, inlet lands, and other areas where geologic, vegetative soil conditions indicate a substantial possibility of excessive erosion or flood damage.[12] Limited exceptions are permitted if necessary to protect bridges that provide the only existing road, or historic sites of national significance.[13]

In South Carolina, "armoring in the form of hard erosion control devices such as seawalls [has] given a false sense of security to beachfront property owners . . . [and] increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry."[14] Consequently, the legislature enacted the South Carolina Beachfront Management Act prohibiting the construction or reconstruction of all new structures, including seawalls, in beach dune systems seaward of an established baseline (usually the crest of the primary sand dune), except for certain federally authorized navigation projects and temporary structures.[15]

South Carolina Coastal Council, the State's coastal management agency, has also established a 40-year retreat policy that requires all development to be setback landward of the baseline at a distance 40-times the average annual erosion rate or not less than 20 feet.[16] New erosion control devices, including seawalls, are prohibited between the

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[6] CODE ME. R. ch. 355, §§ 3(B)(1)(a) and 3(F)(1). Sand dune systems include "beach berms, frontal dunes, dune ridges, back dunes and other sand and gravel areas." ME. REV. STAT. Ann. Tit. 38 § 480-A-Z.

[7] ME. REV. STAT. ANN. Tit. 38 §§ 480A-Z

[8] CODE ME. R. ch. 355, § 3(B)(1)(b).

[9] Id. at § 3(F)(2).

[10] Id. at § 3(B)(3)(b)

[11] N.C. ADMIN. CODE tit. 15A r. 7H.0308(a)(1). These guidelines were adopted pursuant to the 1974 N.C. Coastal Area Management Act, N.C. GEN. STAT. §113A-1000 to 113A-129.

[12] Id. at r. 7H.0301.

[13] Id. at r. 7H.0308(a)(1)(H).

[14] S.C. CODE ANN. §48-39-250(5).

[15] Id. at § 48-39-290 (A) and 48-39-300.

[16] Id. at § 48-39-280 (B).

baseline and the setback line except to protect already-existing public highways, or certain islands where the rest of the island is walled.[17] Replacing or repairing habitable structures damaged beyond repair seaward of the setback line are prohibited and, if damage to an existing erosion control structure exceeds certain percentages, the structure must be removed at the owner's expense.[18] The S.C. Department of Health and Environmental Control is also given the authority to remove all erosion control devices that have an adverse effect on the pubic interest.[19] Even in emergencies declared by county or state officials acting to protect public heath and safety, only sandbags or renourishment - not hard structures - are permitted in beach dune systems.[20]

These stringent provisions have been challenged in the courts. In Esposito v. South Carolina Coastal Council, 939 F. 2d 165 (1992), the 4th Circuit Court of Appeals held that the prohibitions against rebuilding damaged structures seaward of setback lines was not a violation of the due process or takings clause of the U.S. Constitution. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Council denied a permit to a property owner for constructing a house on an eroding beachfront lot. The U.S. Supreme Court found that the Council had deprived the property of all economic value, and therefore the owner was entitled to just compensation under the takings clause. However, the Court also found that no compensation is required for activities that constitute a nuisance under state law.

Thus, state policies that prohibit the construction of sea walls or other erosion control devices do not constitute a taking unless it renders the property devoid of all economic value and the sea wall does not constitute a nuisance. In view of the Esposito case, it is unlikely that the denial of permission to build a seawall deprives property of all economic value. Moreover, the adverse individual and cumulative impacts of seawalls and other erosion control devices on beach sand supplies, and the danger posed by eroding beaches on public safety, homes, property, economic activities and the environment, make a good case for considering such structures a nuisance. Indeed, a California court upheld the declaration of a seawall on public lands a nuisance.[21]

Thus far, prohibiting sea wall construction has not been construed as a taking because there is no fundamental constitutional right to build a seawall, seawall regulation is rationally related to a legitimate government purpose, the property retains value without the seawall, and common law principles support policies restricting seawall construction.[22] Some of these common law principles include: (1) implied easements, (2)

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[17] Id. at § 48-39-290 (B)(2)(a) and (e).
[18] Id. at § 48-39-290 (B)(2) (b) and (c).
[19] Id. at § 48-39-120(C).
[20] Id. at § 48-39-130(D)(1).
[21] In Scott v. City of Del Mar, 58 Cal. App. 4th 1269 (1997), the court upheld the right of the City of Del Mar to declare a nuisance a seawall that encroached on public land. Whether seawalls on private lands constitute a nuisance as not been adjudicated.
[22] *See* Shell Island Homeowners Assoc. v. Tomlison, 134 N.C. App. 217 (1999)(Finding ban on permanent hard erosion control structures constitutional), Stevens v. City of Cannon Beach, 317 Or. 131, 854 P. 2d 449 (1993) (Finding prohibition on building seawall was not a taking);

the public trust doctrine, (3) nuisance law, and (4) other principles of property law, such as protective covenants.[23] Although a full analysis of all possible legal claims against state policies that limit the construction of seawalls exceeds the scope of these comments, California should fully examine all these options to reduce the harm of coastal erosion.

Oregon has taken a dramatically different approach. In 1969, a public easement was declared over the dry sandy beach from the mean high tide line to the first line of vegetation.[24] Consequently, shoreline property owners have only very limited rights to construct protective devices on publicly owned beaches where the public easement interest would not be harmed.[25] California should also consider this approach.

California Law

In some respects the California Coastal Act is most rigorous and protective coastal development law in the nation, but its provisions for protecting beaches from erosion and armoring are one of the weakest. Section 30253 of the Coastal Act does prohibit new development from creating or contributing significantly to erosion, or in any way requiring the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.[26] However, these provisions are substantially undermined by section 30235 which provides that seawalls and other construction that alters natural shoreline processes "shall be permitted" to serve coastal dependent uses or to protect existing structures or public beaches in danger from erosion.[27] At a bare minimum, the inconsistencies between sections 30235 and 30253 should be resolved by allowing the Coastal Commission more discretion in denying the construction of seawalls and erosion control devices that harm coastal resources and exacerbate shoreline erosion.

Although the Coastal Act requires that seawalls and similar devices be designed to eliminate or mitigate adverse impacts on local shoreline sand supply, adequate mitigation is rarely achieved. Decisions to approve shoreline protective devices are usually made on a project-by-project basis without any systematic consideration of cumulative impacts. The result is the "tyranny of small decisions," whereby coastal development permits for

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Whaler's Village Club v. California Coastal Commission, 173 Cal. Ap. 3d 240 (1985) (Finding no fundamental right to build a seawall); and Barrie v. California Coastal Commission, 196 Cal. App. Ed 8 (1987)(Finding that an emergency permit does not convey a vested right to a seawall in that specific location).

[23] See, *e.g.* Steven W. Bender, *Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches*, 77 OR. L. REV. 913 (1998).

[24] State ex. rel. Thorton v. Hay, 254 Or. 584, 462 P. 2d 671 (1969), upholding the Oregon Beach Bill which declared all beaches as state recreation areas where public use was sufficient to create public easements through dedication, prescription, grants or otherwise. OR. REV. STAT. § 390.610.

[25] Stevens v. City of Cannon Beach, supra note 22.

[26] CA PUB. RES. §30253.

[27] CA PUB. RES. §30235. Although section 30235 also requires seawalls to be "designed to eliminate or mitigate adverse impacts on local shoreline sand supply," the very nature of seawalls increases beach erosion.

sea walls are issued routinely by the Coastal Commission and local governments with approved local coastal plans when existing development is threatened by erosion.[28]

Coastal Act provisions that allow armoring to protect existing structures are being abused. The interpretation of "existing structures" to include structures regardless of when they were built renders the Section 30253 prohibitions meaningless. Coastal landowners are encouraged to build in hazardous areas because they are guaranteed a seawall to protect their "existing" structure as soon as it is endangered by erosion.

Property owners can also tear down most of a structure, leave intact small portions of the foundation, and apply for approval to build a seawall to protect the structure when they rebuild, claiming that the structure was "existing." These loopholes should be closed by legislation or rules defining "existing development" as structure standing before 1976 when the Coastal Act was enacted, and the provision should be enforced through deed restrictions recorded with the title.

In addition, the Coastal Act allows beachfront owners to build seawalls without a permit in emergency situations.[29] Once the emergency is over, government agencies are loath to require the removal of the device.[30] The emergency process allows haphazard coastal armoring to take place with little or no regulatory review, mitigation measures, technical or engineering review, or consideration of alternative locations or impacts on coastal access.[31]

The Act also allows the reconstruction of structures destroyed by beach erosion without a permit in the same location so long as it is no more than 10% larger![32] This encourages reconstruction in eroding and hazardous areas. However, a permit is required by a prudent homeowner wants to move the structure out of harms way, away from the eroding bluff or beach. Thus the Act creates perverse incentives to maintain structures in hazardous areas, encourages reliance upon seawalls, and discourages adequate setbacks.[33]

These and other provisions of the Coastal Act allowing the emergency construction of seawalls, and the reconstruction of properties damaged by erosion in the same location without a permit "have established a long term reliance on shoreline armoring to protect private and public development."[34]

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[28] The Coastal Commission approved about 85% of the applications for shoreline protection devices in Malibu between 1978-1996. California Coastal Commission, supra note 3. *See also* Griggs, Pepper and Jordan, *California's Coastal Hazards: A Critical Assessment of Existing Land-Use Policies and Practices*, California Policy Seminar Report, 1992.

[29] CA PUB. RES. §§ 30611 and 30624. 14 CA ADC § 13252(a) and (b).

[30] California Coastal Commission, supra note 3 at 78.

[31] California Coastal Commission, *ReCAP Pilot Project Findings and Recommendations: Chapter 3, Monterey Bay Region,* September 1995.

[32] CA PUB. RES. § 30610(g)(1).

[33] California Coastal Commission, supra note 3.

[34] Id.

Nor is the State getting a fair return, or any return for that matter, for permitting the construction of seawalls and other shoreline protective devices on state lands. The State Lands Commission estimates that it has issued approximately 321 leases or permits for protective structures statewide. Eighty-eight are located along the coast. Since only 1% of the State's boundaries have been fixed, and about 14% of the entire state has some form of armoring, the actual number of structures on state lands are likely to be much more than 321. In any case, the State Lands Commission waives rent for protective structures based on the theory that they provide a public benefit. The burdens to public access and beach erosion are ignored. The State estimates that under existing regulations, which require rents to be based on 9% of the appraised value for the use of state lands, the State could be getting about $2,000 – $4,000 or more annual rent for each structure.[35]

CMC Recommendations on the Resource Agency Draft Policy on Coastal Erosion Planning and Response

In response to the inability of California's regulatory policies to adequately address the critical challenges presented by its rapidly eroding shoreline, the Resources Agency has published a draft policy on coastal erosion. The draft policy is proposed as guidance for departments and commissions within the Resources Agency to consider in addressing coastal erosion and beach loss when reviewing or developing projects, authorizing public and private activities, or commenting on permit actions taken by other state, federal or local government agencies. In other words the draft policies are suggestions for other departments and agencies to apply when issuing permits, conducting activities or submitting comments on other agency actions.

The principles and suggestions articulated in the draft policies for state planning, regulatory, development and project activities are helpful. However, guidance alone will not protect California's rapidly eroding shoreline. The Resources Agency should propose an entirely new state policy, enforced through legislation and regulations, to protect California's beaches from erosion based upon the following principles:

- The State should adopt new policies to protect California's beaches from erosion enforced through legislation and regulations
- New seawall construction on public lands and in hazardous coastal areas should be prohibited, and hazardous coastal areas should be clearly identified and mapped.
- The State should adopt a policy of managed retreat for existing development located too close to eroding beachfront areas, and in any location where beach nourishment is conducted to reduce long-term public costs and negative ecological effects.
- New development should be setback from eroding areas to preclude the necessity to construct seawalls and similar devices for the life of the structure (75-100 years).

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[35] State Lands Commission, supra note 2.

- State and federal subsidies should be eliminated that encourage development near eroding beaches, bluff tops, inlets, floodplains and other hazardous coastal areas.
- The State should prohibit activities that reduce the supply of sand to or along the shoreline (such as dams, diversions, and shoreline protection devices), and undertake projects to enhance sand transport (such as dam removals).

Specifically, these principles should be enforced through the following amendments to the California Coastal Act and other state laws and regulations:

- Section 30235 of the Coastal Act should be amended to:
  - Remove the provision that states that seawalls and other devices "shall be permitted" to serve coastal dependent uses or to protect existing structures or public beaches.
  - Define existing development as a structure standing before the Act was enacted in 1976.
  - Prohibit new construction or expansion of seawalls and other devices on beaches, frontal dunes, inlets and other areas subject to substantial risk of erosion or flood damage except to protect public resources.
  - Prohibit the construction of seawalls and other devices to protect accessory or ancillary structures such as garages or septic systems.
  - Require existing seawalls and other devices to be removed and the site restored to natural conditions within one year if and when the shoreline recedes or if the seawall is damaged more than 50%.
  - Declare all non-permitted sea walls and shoreline protective devices a public nuisance.

- Section 30253 of the Coastal Act should be amended to ensure that new development and land divisions are:
  - Setback landward of the crest of the primary frontal dune or bluff top at least 75-100 times the average annual erosion rate but not less than 100 feet.[36]
  - Prohibited on sand dunes seaward of a 100-year storm.

- Amend Section 30610(g)(1) of the Coastal Act to:
  - Require coastal development permits for the replacement of property damaged or destroyed by ocean erosion
  - Require that the reconstruction of damaged property occur as far landward as possible, and in no case require need for a seawall or other device during the life of the structure.
  - Prohibit the reconstruction of buildings destroyed by more than 50%.

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[36] California Coastal Commission, *Beach Erosion and Response Guidance Document* (1999) at 124.

- Amend Section 30600(e) of the Coastal Act to require follow-up coastal development permits for emergency actions undertaken to protect public roads that result in the placement of new or expanded shoreline armoring, and the use of the least environmentally damaging engineering alternative.

The Resources Agency should recommend that Congress extend to California the Coastal Barrier Resources System (CBRS) to designate areas of high risk from coastal erosion and flooding ineligible for federal flood insurance and other federal subsidies. The State of California should also prohibit subsidizing development in eroding coastal areas.

The Coastal Barrier Resources System was created in 1982 and expanded in 1990 to comprise nearly 1.3 million acres, and 1,200 miles of privately owned undeveloped coastal barrier beaches along the East Coast, Gulf of Mexico and Great Lakes.[37] The area also includes an additional 1.8 million acres of park and conservation lands (called "otherwise protected areas"). The West Coast is the only region lacking a CBRS or comparable federal protection to prevent taxpayers from subsidizing hazardous coastal development.

Although development is not precluded within the CBRS, dangerous and environmentally harmful coastal development is ineligible for federal flood insurance, roads, bridges, erosion control projects and other federal projects.[38] The CBRS is based upon the principle that the risks associated with new development in hazardous, damage prone areas should not be borne by American taxpayers, and that conservation can be achieved without increasing federal regulatory involvement simply by withdrawing federal financial support for unwise development.[39] Indeed studies have shown that areas outside the CBRS are three times more likely to be developed than areas within the CBRS.[40] The CBRS is a clearly a win-win situation, and should be extended to fragile beaches and ecosystems in California. It takes the government out of the business of subsidizing risky development thereby saving taxpayers' money, minimizing the loss of human life, and protecting beaches.

California should declare a public easement over the dry sandy beach from the mean high tide line to the first line of vegetation throughout the State as Oregon declared in 1967.

In the 1967 Beach Bill, the Oregon Legislature declared public rights and easements in the free and uninterrupted use of the State's beaches from the mean high tide line to the first line of vegetation.[41] This public easement over the dry sandy portion of the State's beaches was based upon the public's historic, frequent and uninterrupted use of these beaches adjacent to state tidelands. While this solution may seem extreme, it has the

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[37] Coast Alliance, *Development on Coastal Barriers: Does The Coastal Barrier Resources Act Make A Difference?* (2000).
[38] 16 USC 3501 et seq.
[39] Coast Alliance, supra note 37.
[40] Id.
[41] ORS § 390.610.

advantage of possibly saving the State billions of dollars in long-term costs nourishing beaches, constructing erosion control devices, providing public access and protecting beach habitat.

Submitted on behalf of the Center for Marine Conservation and Save our Shores by:

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